United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1045

To be argued by
RICHARD F. LAWLER

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1045

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS CIRILLO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

RICHARD F. LAWLER,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES CITED

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1045

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS CIRILLO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Louis Cirillo appeals from an order of the United States District Court for the Southern District of New York filed on January 19, 1977, by Edward Weinfeld, United States District Judge, denying Cirillo's motion to vacate his sentence.

Indictment 72 Cr. 309 was filed in two counts on March 17, 1972, charging Cirillo with violations of the federal narcotics laws. On April 25, 1972, after a six day jury trial, Cirillo was found guilty on both counts.

Cirillo was sentenced on May 25, 1972, to two concurrent terms of twenty-five years imprisonment, to be followed by a special parole term of ten years. Because of his previous conviction of violations of Title 21, United

States Code, the possible maximum sentence he could receive was increased pursuant to Title 21, United States Code, Sections 841(b)(1)(A) and 851(a)(1) and (b). That conviction was affirmed on appeal, 468 F.2d 123 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).

On November 22, 1976 Cirillo moved, pursuant to Fed. R. Crim. P. 35 and Title 28, United States Code, Section 2255, to vacate his sentence as illegal on the ground that a second offender information ("Information") necessary for an enhanced sentence under Title 21, United States Code, Section 851(a)(c) had not been properly filed.

After a hearing held on January 17, 1977, at which witnesses were heard, the Court (Edward Weinfeld, J.) denied Cirillo's motion in an opinion dated January 19, 1977.

Statement of Facts

A. The Trial and Sentence

1. The Trial

Indictment 72 Cr. 309, filed March 17, 1972, charged Cirillo in two counts with violations of the federal narcotics laws. Count One charged that Cirillo and eight others, named as co-conspirators but not as defendants, had conspired to import, possess with intent to distribute, and distribute narcotic drugs in violation of Title 21, United States Code, Sections 846 and 963. Count Two charged Cirillo with possession of approximately 83 kilograms of heroin with intent to distribute, in violation of Title 21, United States Code, Sections 821, 841(a)(1) and 841(b)(2) and Title 18, United States Code, Section 2.

The trial began on April 17, 1972, and ended on April 25 when Cirillo was found guilty by a jury on both counts.

On May 25, 1972, Cirillo was sentenced by Judge Weinfeld to concurrent 25 years terms to be followed by concurrent special parole terms of 10 years. Cirillo is presently serving his sentence.

Cirillo's appeal was denied on November 6, 1972, and the Supreme Court denied certiorari, *United States* v. *Cirillo*, 468 F.2d 1233 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).

2. The Sentence Proceedings

At the time of sentence, immediately after the case was called, the United States Attorney, Whitney North Seymour, Jr., informed the court that an Information had been filed charging Cirillo as a prior narcotics offender.*

The following is a transcript of the initial statement made by the United States Attorney to the court on May 25, 1972:

(Case called.)

Mr. Seymour: The government is ready, your Honor.

Mr. Krieger: The defendant is ready.

The Court: You may proceed, gentlemen.

Mr. Seymour: If your Honor please, I believe the first order of business is to deal with the information that has been filed charging this defendant as a prior narcotics violator. I hope that the information is before the court. If not, I have a copy of it here.

The Court: I don't have it.

(Mr. Seymour hands document to court.)

Mr. Seymour: In connection with the copy of the information I am handing up to your Honor, there is one clerical error in the docket sheet downstairs that I would like to ask be corrected nunc pro tunc on the order. This information was in fact filed on April 12th. The docket sheet has the date transposed as being April 21st, which would make it actually after the commencement of trial and is an error. (A. 13).

Citations to "A" refers to the appellants appendix.

He noted that there was a "clerical error in the docket sheet" and he asked that this error be corrected *nunc pro tunc*. Mr. Seymour further explained that the Information was filed on April 12th whereas the docket sheet read April 21st, and specifically asked that the docket be corrected. This was accomplished in a colloquy as follows:

> Mr. Seymour: I would like to ask your Honor to direct that the docket be corrected to show the proper date.
>
> The Court: What date?
>
> Mr. Seymour: April 12th was the actual date of filing and a copy was served on counsel at that time.
>
> The Court: All right. The defendant may be arraigned with respect to the information. Have you served a copy upon Mr. Krieger?
>
> Mr. Seymour: Yes, your Honor.
>
> Mr. Krieger: Your Honor, I received a copy some time ago.
>
> The Court: Read the information to the defendant Madam Clerk. (A. 14).

B. The Present Motion

On November 22, 1976, approximately four years after his appeal and over four and one-half years after the date of sentence, Cirillo moved to vacate his sentence on the grounds that "the total and purposeful failure, refusal and neglect of the United States Attorney to comply with 21 United States Code Section 851" resulted in an illegal sentence. (A. 2).

In essence, Cirillo argued that the United States Attorney, Whitney North Seymour, Jr., was aware that

under the specific requirements of Title 21, United States Code, Section 851, a second offender information must be filed prior to the commencement of trial and that such a filing had not taken place, and that Mr. Seymour "purposely and intentionally misadvised the court" that the Information had been timely filed, thereby inducing the Court to impose an illegally enhanced sentence. (A. 4).

As part of his motion papers, Cirillo attached a copy of the docket sheet in indictment 72 Cr. 309. An examination of the docket sheet reveals that the Information is listed as filed on "4-21-72" (A. 34). In addition, the Information itself shows a District Court filing stamp dated April 21, 1972, but a signed, notarized affidavit of mailing to Albert J. Krieger, Esq., attorney for Cirillo, attached to the information and signed by Assistant United States Attorney Dean C. Rohrer, was dated April 10, 1972. (A. 37, 38).*

C. The Hearing

At the hearing on the motion, held on January 17, 1977, Cirillo called four witnesses and the Government two.

1. Cirillo's Witnesses

Mr. Edward Aponte testified that he was Orders and Appeals Clerk for the District Court and was familiar with the filing procedure for court documents. (A. 67). However, he did not work in the docket section of the

---

* As part of its answering papers the Government submitted an affidavit by Dean Rohrer stating that the affidavit attached to the Information was his and though he had no independent recollection of filing the Information it was his normal practice to have filed papers with the Court at or about the same time he mailed them. (A. 54).

clerk's office and had no personal knowledge of the documents in question. (A. 98-99).

Aponte testified that each document received by the court is hand stamped by the clerk receiving it, who is responsible for insuring that the date stamp is correct. If an error in stamping is discovered it is changed by order of the court. (A. 67, 70). In addition, Aponte stated that the Information in 72 Cr. 309 appeared to him to have been filed when stamped, April 21, 1972, and he knew of nothing that would indicate that this was not the correct date of filing. Aponte explained that the docket sheet was prepared directly from the stamped copy of the document so that it would merely mirror the stamped date.*

On cross-examination, Mr. Aponte acknowledged that the date on the stamps is changed manually and when looking at the stamp to see the date one looks at the numbers in reverse order. He also testified that there may be instances when a document is not stamped upon receipt and that if a document were filed in chambers or in court the docket entry would not necessarily reflect the date the document was filed. (A. 99-100, 102).**

---

* The two crossed out entries on the docket sheet, appearing below the listing for the Information, he identified as erroneous entries of second offender informations apparently intended for 72 Cr. 313. These Informations had also been stamped April 21, 1972, and were accompanied by an affidavit of mailing dated April 17, 1972. He said that if an item has been brought to be filed by the trial clerk it is docketed out of order and marked by an asterisk. (A. 76, 79, 84-86, 93).

** He also agreed that the Government's Supplemental Request to Charge (GX 1) appeared on the docket sheet as filed August 8, 1972, almost 5 months after trial, even though there was nothing on the document to reflect that it had been filed with the court. Finally, he noted that errors do occur in the Clerk's Office and in fact agreed that his own files reflected that at the present time the file in this case was with the Court of Appeals. (A. 103, 105).

Dorothy Dean testified that she was a clerk in the Federal District Court in the Southern District of New York.* She identified her initials on the Information indicating she had docketed it, although she did not remember having done so. (A. 117). She said the first person to use the date stamp on any day made sure it was correct. On occasion, she had made errors with the stamp but had corrected them when discovered by marking "error" on the wrong date. (A. 116).

She also noted that papers were usually stamped the same day received, although on cross-examination she stated that some documents were neither stamped nor docketed but sent directly to chambers or the court. (A. 125). Dean also agreed that it was possible that the Information had become attached to another document, was missed by the clerk and sent directly to the file room. If it had been discovered in the file room, stamped and returned to be docketed, there would be no way of identifying what had happened. (A. 127-29).

Whitney North Seymour, Jr. testified that he was United States Attorney in April 1972, that he had tried the Cirillo case and that he had informed the court of the error in the docket sheet and had asked that it be corrected *nunc pro tunc*. The Information had been filed by one of his assistants and he had been advised by an assistant of the filing on the 12th of April and the erroneous date appearing on the docket sheet. Mr. Seymour said that he relied on his assistant for the information he gave to the court at the time of sentence (A. 133-35, 137, 141) and that he had no document to indicate that the Information was filed on April 12, 1972 (A. 144).

---

* On cross-examination she stated that in 1972 she was a trainee and that was the only time she worked with files concerning criminal cases. (A. 123).

In answer to a question by the Court, Mr. Seymour denied that he had purposely and intentionally misadvised or mislead the Court. There was no cross-examination. (A. 145).

The final witness called by Cirillo was Arthur J. Viviani, who had been an Assistant United States Attorney in April 1972 assisting Mr. Seymour in the prosecution of Indictment 72 Cr. 309. He was present on the date of sentence but did not remember anything concerning the filing of the Information. On cross-examination, he testified that it was his practice to file documents in his cases himself but he did not remember whether he filed the Information in 72 Cr. 309. He also said he was aware at that time of the requirement that the Information be filed prior to trial. (A. 147, 154).

2. Government's Witnesses

Dean Rohrer, also an Assistant United States Attorney in April 1972, worked with Mr. Seymour in the preparation and trial of 72 Cr. 309, and had also assisted in two earlier cases prepared against Mr. Cirillo. He testified that he was aware of the filing requirement for the Information, since he had prepared one for an earlier Cirillo trial. (A. 159). Mr. Rohrer identified the affidavit of mailing as having been prepared by him; he said that he had no present recollection of filing the Information but stated his normal practice, after completing the affidavit, was either to file the item himself or to deposit it with the criminal clerk's office for filing. He testified that he had not been told that the Information had not been filed and that he would remember such a thing if it had been brought to his attention. (A. 157-60).

The final witness, Helen Kowalski, testified that she was a legal clerk in the United States Attorney's Office

and that at least twice a day her office would deliver papers to be filed to the court clerk's office where they would either be delivered to the clerk or put in the file box. She said she was not aware of any document ever being lost in the criminal clerk's office before it was filed (A. 166-69).

D. The Decision

In a memorandum decision dated January 19, 1977, Judge Weinfeld denied Cirillo's Motion. (A. 187). The court found that Cirillo had failed to sustain his claim that the Information was filed after trial had begun and in fact that the evidence indicated that it had been filed prior to trial. In commenting upon the evidence, the court noted that the Assistant United States Attorney had sworn to an affidavit of mailing on April 10, 1972, and testified that it was his practice to file papers at or about the time they were mailed; in addition at the time of sentence the United States Attorney had moved on the record for a correction to reflect the proper date of filing and defendant's counsel not only offered no objection but stated he had received "a copy some time ago." Judge Weinfeld held that the record had properly been corrected *nunc pro tunc*. He also noted that defendant's trial counsel was of exceptional ability and experience and would not have consented to the correction had the facts been otherwise. In addition, Judge Weinfeld found the failure to offer any testimony by Cirillo's trial counsel to be of great significance.*

---

* Cirillo has attempted to remedy the omission of any testimony by defendant's trial counsel by now attempting to include an affidavit in a supplemental appendix and moving for its admission. Even though the affidavit is of no probative value, it is not a part of the record in this appeal and should not be considered by the Court. Fed. R. App. P. 10(a).

The court held that in order to accept Cirillo's theory the court would have to believe either that the United States Attorney intentionally lied to the court or that one of his assistants deliberately lied to the United States Attorney. The court held that there was not sufficient evidence to warrant this conclusion. Finally, the court noted that mistakes in the filing of documents in the Clerk's office are not uncommon. (A. 188-89).

ARGUMENT

POINT I

Cirillo has Failed to State A Claim that Can Be Raised By A Motion Pursuant to 28 U.S.C. § 2255 or Rule 35 of the Federal Rules of Criminal Procedure.

More than four years after his sentence, Cirillo claimed for the first time that the procedural requirements of Title 21, United States Code, Section 851, relating to the filing of a second-offender information had not been satisfied, and that his sentence was thus illegal. Particularly under the facts of this case, it is clear that neither 28 U.S.C. § 2255 nor Rule 35 of the Federal Rules of Criminal Procedure offers any ground for attacking his sentence.

The Supreme Court has emphasized the limited nature of the relief available under 28 U.S.C. § 2255. In *Davis* v. *United States*, 417 U.S. 333, 346 (1974), the Supreme Court noted

> This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill* v. *United States*, 368 U.S. 424, 429 (1962), for example, we held that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements" of a rule of

> criminal procedure in the absence of an indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Id.*, at 428 (internal quotation marks omitted.)

Similarly, in *Hill* v. *United States*, 368 U.S. 424 (1962), the court emphasized that the mere technical non-compliance with a rule of criminal procedure—in that case, the failure to permit the defendant to speak on his own behalf at the time of sentence, as required by Rule 32(a) of the Federal Rules of Criminal Procedure—does not provide a basis for collateral attack on the sentence. See also *United States* v. *Travers*, 514 F.2d 1171 (2d Cir. 1974).

Even if one were to accept Cirillo's factual averments as true—although, as we demonstrate in Point II, *infra*, they are clearly not—it unquestionably follows from these cases that Cirillo's motion stated no claim for which relief could be granted. It should be noted that at no time does Cirillo even allege in his moving papers that he was unaware prior to trial that he had been convicted of the prior narcotics felony and that the Government intended to seek an enhanced sentence, nor does he claim that the information as filed was not accurate. The purpose of the section 851 requirements is to give all parties adequate notice of the Government's exercise of discretion whether or not to file such an affidavit, see H.R. Rep. No. 91-1444, 91st Cong., 2nd Sess. U.S. Code Cong. and Admin. News 4566, 4575-76, and thus even under Cirillo's distorted view of the facts none of the policies underlying the

procedural requirements were affronted. Since at most Cirillo disputes the *timing* of the filing of the Information, and not its accuracy or significance, his claim certainly does not amount to a "miscarriage of justice" sufficient to assert relief under Section 2255.*

In addition, while all of the facts underlying this collateral attack were fully available to Cirillo and his extremely experienced trial attorney at the time of trial, the issue was not raised on appeal although, as noted, Cirillo did appeal his conviction on other grounds. The law in this Circuit is clear that a defendant cannot collaterally attack a judgment of conviction based on issues that could have been presented on direct appeal but were not. *United States* v. *Wright*, 524 F.2d 1100, 1102 (2d Cir. 1975); *United States* v. *West*, 494 F.2d 1314 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974); *United States* v. *Sobell*, 314 F.2d 314, 323 (2d Cir. 1963); see generally, *Sunal* v.

---

* None of the cases upon which Cirillo relies holds to the contrary. Three decisions of the United States Court of Appeals for the Fifth Circuit, discussed in Cirillo's Brief at 18-20, discuss the significance of failure to effect a timely filing of a second-offender information. *United States* v. *Noland*, 495 F.2d 529, 530 (5th Cir.), *cert. denied*, 419 U.S. 966 (1974); *United States* v. *Garcia*, 526 F.2d 958 (5th Cir. 1976); *United States* v. *Cevallos*, 538 F.2d 1122 (5th Cir. 1976). In each of those cases, however, the defendant never even admitted the accuracy of the information, as required by 21 U.S.C. § 851, and as Cirillo explicitly did at the time of his sentence, nor was the defendant in *Noland* even aware of the information prior to trial. Furthermore, *Noland* and *Garcia* each involved direct appeals from judgments of conviction, and thus did not involve the more limited availability of review on collateral attack. In *Cevallos*, the Court of Appeals merely remanded the case to the District Court to allow the defendant to affirm or deny the prior conviction, but declined to reduce the sentence to the maximum that would be allowed if not enhanced. See 538 F.2d at 1128. Thus, none of these cases support the availability of relief sought by Cirillo.

Large, 332 F.2d 174, 178 (1947). Cirillo's failure to appeal is particularly significant since the very issue of the initial incorrectness of the docket entry was specifically brought to his attention and that of the Court at the time of sentence; thus, he cannot plausibly claim that he has since "discovered" the issue.* In addition, of course, one of the principal underpinnings of the rule requiring that issues raisable on appeal be considered on direct, rather than collateral, review—that is, that when an issue is raised years after the event memories may have dimmed or documents been lost, see *United States* v. *Sobell*, 314 F.2d 314, 324-25 (2d Cir. 1963) (Friendly, *J.*)—applies with particular aptness to this case. Indeed, Cirillo's claim that the Government did not satisfactorily rebut the inferences to be drawn from the dates on the docket sheet results primarily from his own inexcusable delay in raising the matter, and allowing the memories of those with direct knowledge of the events to fade.

Finally, it should be noted that Rule 35—which provides in part that an "illegal sentence" may be corrected "at any time"—did not provide Cirillo with an alternative avenue of review. The Courts have considered a sentence "illegal" only if it is illegal on its face. *Hill* v. *United States*, 368 U.S. 424, 430 (1962); *United States* v. *Malcolm*, 432 F.2d 809 (2d Cir. 1970). However, if it is necessary for a reviewing Court to go beyond the record in order to establish the legality of the sentence, then the sentence is considered to have been "imposed in an illegal manner" and thus subject to the 120-day limitation that Cirillo concededly has not met. *Heflin* v.

---

* In *Seiller* v. *United States*, 544 F.2d 554, 568 (2d Cir. 1975), this Court noted that a claim raised "only belatedly" should be viewed on collateral attack with particular circumspection. Cirillo's delay of more than four years before raising this issue for the first time certainly deserves such treatment.

United States, 358 U.S. 415, 418 (1958). That this was a sentence "imposed in an illegal manner" rather than an "illegal sentence" is clear from the fact that Cirillo does not challenge the accuracy of the information—or, indeed, the adequacy of his affirmation of it at sentence—but only the timing of its filing. Cf. *United States* v. *Cevallos*, *supra*.

In short, Cirillo has not even alleged facts that would entitle him to any relief.

POINT II

The District Court's Conclusion That The Information Was Filed on April 12, 1972, Was Correct.

Cirillo claims that the evidence conclusively established that the Information was not filed until April 21, 1972. Since, after conducting a full hearing, Judge Weinfeld made specific findings to the contrary, Cirillo can only succeed in this Court if he establishes that the District Court's findings are clearly erroneous. *United States* v. *Pfingst*, 490 F.2d 262, 273 (2d Cir. 1973); *Zovluck* v. *United States*, 448 F.2d 339, 341 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972).

Cirillo attempts to show that Judge Weinfeld incorrectly determined that the Information was timely filed by emphasizing that the later date was stamped on the Information and entered on the docket sheet. However, Judge Weinfeld took account of those markings and went on to determine that they incorrectly represented the date on which the Information was actually filed. There was ample evidence to support this conclusion. As Judge Weinfeld noted, the clerical error was brought to the

District Court's attention at time of sentencing, when the United States Attorney moved to have the record corrected *nunc pro tunc*. (A. 13-14). This correction was ordered by the District Court after defense counsel not only failed to register any objection but also stated that he had received the Information "some time ago." (A. 14). The reliability of that report to Mr. Seymour was established by the testimony of the Assistant who attested to the affidavit of mailing, dated April 10, 1972. Although the Assistant was unable to recall the specific incident, he could and did testify that his regular practice was to file papers on or near the date of mailing. (A. 158). Finally, the evidence amply supported a finding that papers timely filed in the District Court Clerk's office could be incorrectly marked due to a clerical error. (A. 116).*

Against this strong record, Cirillo is forced to rely on an argument that witnesses such as Eddie Aponte, Helen Kowalski, and Dorothy Dean were unable to say that the Information was not filed on April 21, 1972. However, this contention does no more than restate defendant's reliance on the date stamp since none of these witnesses had any personal knowledge of the events and could only refer to the date stamped on the document.

---

* Cirillo has tried to belittle the Government's reference to the possibility of error in the date stamp. (Br. 14). The strong possibility of that occurrence was enhanced in this case where a document should have been marked "April 12" and was instead marked "April 21." It would be a natural mistake in changing a date stamp from the 11th to the 12th to change the wrong digit, causing a "21" instead of a "12" to appear. Cirillo's answer to this is that such a mistake would have occurred only if the entire date, "April 21, 1972" were to appear in "mirror-reverse." (Br. 14). However, that contention makes no sense since there was no need to change the month or the year, which remained the same in the passage from April 11th to April 12th.

In an effort to make the date stamp conclusive, Cirillo argues that it is endowed with a "presumption of regularity" that must be overcome by the party against whom it operates. If indeed the original date stamp were entitled to such a presumption, the time to rely on it was at sentencing when the United States Attorney alerted the District Court to a clerical error and obtained, without objection, a correction of the date. In any event, there was more than enough evidence presented at the hearing to overcome any "presumption of regularity" to which the date stamp may be entitled and to support Judge Weinfeld's findings on the issue.

Finally, Cirillo also argues that the District Court incorrectly placed upon him the burden of proving his contention. However, the burden was properly upon him. This Court has held that, under 28 U.S.C., Section 2255, the burden is on a defendant moving to set aside the ruling of the court that the Information had been timely filed. *Johnson* v. *Zerbst*, 304 U.S. 458, 468-69 (1938); *Papalia* v. *United States*, 333 F.2d 620, 621 (2d Cir.), *cert. denied*, 379 U.S. 838 (1974); *Zovluck* v. *United States*, *supra*, at 341. Moreover, when there has been a long period of time since the trial, the burden upon the moving party becomes even more severe. *Bishop* v. *United States*, 223 F.2d 582 (D.C. Cir.), *vacated on other grounds*, 350 U.S. 961 (1955); *United States* v. *Edwards*, 152 F. Supp. 179 (D.C.D.C. 1957), *affirmed*, 256 F.2d 707 (D.C. Cir. 1957), *cert. denied*, 358 U.S. 847 (1958).* Judge Weinfeld's conclusion that Cirillo failed to meet this heavy burden was entirely correct.

---

* The cases cited by defendant in support of his claim are not on point. They do not deal with a situation, such as this one, in which it is the defendant who has made the motion and it is the defendant who must overcome the record which shows the information to have been timely filed.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

RICHARD F. LAWLER,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1977— 714-017-574

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Richard F. Lawler being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 11th day of April 1977 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

John V. Tavuzzi, Esq
233 Broadway
New York, New York
10007

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at the United States Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan, City of New York.

Richard F Lawler

Sworn to before me this

11th day of April, 1977

Jeanette Ann Graves

JEANETTE ANN GRAVES
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979